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COULD A SHOPPING CENTER GO TO POT? UPDATE ON MARIJUANA-BASED BUSINESSES IN MICHIGAN

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I. Medical Marijuana¹ - Background

A. The Michigan Medical Marihuana Act (**Tab 1**)

1. Currently (as of December 28, 2016), 28 states and the District of Columbia have enacted laws to legalize the use of medical marijuana. (Eight states have voted to legalize the drug recreationally.)

2. In Michigan, the Michigan Medical Marihuana Act (the "Act") was approved by voters in November, 2008 by a wide margin (63% to 37%) through a ballot initiative, which means that any changes to the law must be approved by 75% of the legislature.

3. The Act is administered by the Health Professions Licensing Division in the Bureau of Health Care Services at the Michigan Department of Licensing and Regulatory Affairs, which is responsible for registering patients and caregivers.

4. For the period from October 1, 2013 to September 30, 2014, there were 92,652 initial applications received, of which 71,336 were approved, and 24,329 renewal applications received, of which 20,562 were approved. During that time the state made a profit of slightly more than \$3 Million in fees collected from applicants.

5. The Act provides a defense against prosecution for the Qualifying Patient (a person who has been diagnosed by a physician as having a debilitating medical condition) and the Primary Caregiver (a person who has agreed to assist with a patient's medical use of marijuana).

a. The Qualifying Patient must have a "debilitating medical condition" as defined by the Act, such as:

i. Cancer, AIDS, Hepatitis C, ALS, Crohn's Disease, Alzheimer's disease. MCLA §333.26423(b)(1).

ii. A chronic or debilitating disease or medical condition that produces such things as severe and chronic pain, severe nausea, seizures or severe and persistent muscle spasms. MCLA §333.26423(b)(2).

b. The Primary Caregiver can assist up to five Qualifying Patients. MCLA §333.26426(d).

c. A licensed physician must complete a full assessment of the Qualifying Patient's medical history, including a "relevant, in-person medical

¹ The Michigan statutes refer to marijuana as "marihuana", and we will use the statutory spelling only when referring to the Acts or directly quoting from them.

evaluation" and certify that a patient is qualified and would receive therapeutic or palliative benefit from medical marijuana. MCLA §333.26423(m).

d. After obtaining the written certification from the physician, the Qualifying Patient may apply for a registry card with the Health Professions Licensing Division.

6. A Qualifying Patient can have no more than 2.5 ounces of usable marijuana;

7. If the Qualifying Patient does not have a Primary Caregiver, he or she can have up to 12 marijuana plants stored in an enclosed, locked facility;

8. A Qualifying Patient may also possess an incidental amount of seeds, stalks and unusable roots. MCLA §333.26424(a).

9. A Primary Caregiver is subject to the same rules as above for each Qualifying Patient he or she assists. MCLA §333.26424(b).

10. Restrictions on medical marijuana use:

a. Qualifying Patients may not smoke marijuana on any form of public transportation or in any public place. MCLA §333.26427(b)(3).

b. Qualifying Patients may not possess marijuana in a school bus, on the grounds of any preschool or primary or secondary school or in any correctional facility. MCLA §333.26427(b)(2).

c. Qualifying Patients may not operate any motor vehicle, aircraft or motorboat while under the influence of marijuana (MCLA §333.26427(b)(4)) or undertake any task under the influence of marijuana when doing so would constitute negligence or professional malpractice. MCLA §333.26427(b)(1).

d. An owner of a hotel, motel, apartment building or similar facility can prohibit the smoking of marijuana and the growing of marijuana plants anywhere within the facility. MCLA §333.26427(c)(3)(eff. 4/10/2017).

e. An employer is not required to accommodate the ingestion of marijuana in any workplace. MCLA §333.26427(c)(2).

B. State and Federal Interplay

1. Marijuana is still considered a Schedule I controlled substance under the Controlled Substances Act (CSA), meaning that it has a high potential for abuse, has no currently accepted medical use in treatment in the US, and there is a lack of accepted safety for use of the substance under medical supervision. See, CSA, 21 USC §812(b).

2. On July 19, 2016, the Drug Enforcement Administration (DEA) denied a petition to initiate rulemaking proceedings to reschedule marijuana as a Schedule II drug. 81 FR 53767.

3. On December 14, 2016, the Drug Enforcement Administration clarified that marijuana extracts – including cannabidiol (CBD) – fall under Schedule I drug classification, making all forms of the plant illegal under federal law. 81 FR 90194.

4. Deputy Attorney General James Cole has issued a memorandum outlining the circumstances under which the US Attorney's office will prosecute marijuana related businesses. See, "Guidance Regarding Marijuana Enforcement," August 29, 2013 (**Tab 2**). This memorandum was issued to provide guidance to federal prosecutors concerning marijuana enforcement under the CSA. The memorandum established several priorities for enforcement of the marijuana laws:

- a. Preventing the distribution of marijuana to minors;
- b. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- c. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- d. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- e. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- f. Preventing drugged driving and exacerbation of other adverse public health consequences associated with marijuana use;
- g. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- h. Preventing marijuana possession or use on federal property.

5. These enforcement priorities could easily change with the Trump administration (Attorney General-designate Jeff Sessions has been consistently opposed to legalized marijuana), so any landlord is undertaking a risk that even if the marijuana related business is operated in accordance with state law, the federal government could seek forfeiture under 21 USC §881(a)(7). An example of a challenge to a forfeiture action is found in City of Oakland v Lynch, 798 F3d 1159 (9th Cir 2015).

6. The illegality of marijuana as a Schedule I drug also creates ethical issues for attorneys in Michigan.

a. The Michigan Rules of Professional Conduct (MRPC) state that “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.” MRPC 1.2(c).

b. The Michigan Supreme Court has not yet taken action to amend the MRPC to permit lawyers to counsel or assist clients in legal matters permitted under either the Act or the more recent statutes adopted by the Legislature (see below).

C. Public Opinion of Marijuana

1. An EPIC-MRA Statewide Survey of 600 people conducted in March, 2016 found that 53% of Michigan voters would vote "yes" on a ballot proposal to legalize and tax marijuana, with 45% voting "no" and 2% undecided. See, EPIC-MRA Press Release issued March 28, 2016 (**Tab 3**).

2. This figure is up three points from a 50% to 46% bare majority voting "yes" in December, 2014, and six points up from a 47% plurality who favored one of four proposals that would legalize and tax marijuana in September, 2013.

3. Seven states voted to legalize marijuana in some form on Election Day, 2016. California, Maine, Massachusetts and Nevada legalized recreational marijuana while Arkansas, Florida and North Dakota voted to legalize medical marijuana. The only marijuana ballot proposal to lose was a recreational legalization proposal in Arizona.

II. New Statutes in Michigan Relating to Marijuana

A. On September 21, 2016, Governor Snyder signed a series of bills that created the Medical Marijuana Facilities Licensing Act, the Marijuana Tracking Act and amended the Michigan Medical Marijuana Act to allow for the manufacture and use of marijuana-infused products by Qualifying Patients and for the manufacture and transfer of such products by Primary Caregivers. These new laws took effect on December 20, 2016. (**Tab 4**)

B. PA 281 of 2016 (MCLA §§333.27101-333.27801)(**Tab 5**) creates a comprehensive licensing scheme for growers, processors, provisioning centers, secure transporters and safety compliance facilities. It also creates a 3% tax on the provisioning center's gross retail receipts. MCLA §333.27601(1).

1. A provisioning center is defined as "a licensee that is a commercial entity located in this state that purchases marihuana from a grower or processor and sells, supplies, or provides marihuana to registered qualifying patients, directly or through the patients' registered primary caregivers." MCLA §333.27102(r).

2. Municipalities are permitted to adopt an ordinance to authorize one or more types of marijuana facilities and to limit the number of each type of facility. MCLA §333.27205(1). The municipality can establish an annual, nonrefundable licensing fee of not more than \$5,000 (MCLA §333.27205(3)).

3. Each licensee is required to provide information regarding each plant, product, package, batch, test, transfer, conversion, sale, recall or disposition of marijuana. MCLA §333.27207. The apparent goal is to track each and every single marijuana plant in the state from the time the seed is planted until the time the plant or its byproducts are used or destroyed.

4. The Medical Marihuana Facilities Licensing Act also established both a Medical Marihuana Licensing Board (MCLA §§333.27301-333.27305) to implement the Act and, among other things, grant or deny applications for licenses, as well as a Marihuana Advisory Panel (MCLA §333.27801) to make recommendations to the Licensing Board regarding rules and the enforcement of the act.

C. PA 282 of 2016 (MCLA §§333.27901-333.27904)(**Tab 6**) creates a statewide monitoring system for use as an integrated marijuana tracking, inventory and verification system.

D. PA 283 of 2016 (**Tab 7**) amends the Michigan Medical Marihuana Act to permit the use of marijuana-infused products, which are broadly defined as any product containing usable marijuana for human consumption other than smoke inhalation. This amendment also places additional restrictions on the transportation of either marijuana or marijuana-infused products.

III. Obtaining Municipal Approval

A. A marijuana facility *cannot operate* in a municipality unless the municipality adopts an ordinance authorizing that type of facility. MCLA §333.27205(1) A municipality may enact an ordinance to authorize one or more types of marijuana facilities, and limit the number of each type of facility, within its boundaries, charge an annual local fee up to \$5,000 on licensees and enact other ordinances related to marijuana facilities such as zoning ordinances. Ibid.

B. The City of Detroit passed an ordinance in December, 2015 (City Code §61-3-351, et seq.)(**Tab 8**) that provides for the licensing of Caregiver Centers and establishes numerous restrictions on the location and operation of the centers.

1. Caregiver Centers can be established in the B2, B4, M1, M2, M3 and M4 zoning districts. Prohibited areas include Traditional Main Street Overlay or Gateway Radial Thoroughfare Areas.

2. Caregiver Centers must provide one off-street parking spot for every 200 square feet of the Center.

3. Caregiver Centers cannot be less than 1,000 feet from another Caregiver Center (except in an industrial district), from a park recognized by the Recreation Department, from a religious institution which has received a tax exemption from the city, or from businesses identified as a controlled use (topless clubs and liquor stores).

4. The ordinance allows for a variance process that could still allow a Caregiver Center to establish or continue to operate notwithstanding its location near another Caregiver Center, park, religious institution or controlled use business.

5. Caregiver Centers cannot be less than 1,000 feet from Drug Free Zones (libraries, arcades, child care centers, youth activity centers, public housing, outdoor recreation areas and all educational institutions), and no variance is allowed. There are thousands of Drug Free Zones in the City of Detroit (see map attached as **Tab 9**).

C. The City of Ferndale passed an Ordinance in 2010, and subsequently amended it in 2016 (**Tab 10**), providing for licensing of medical marijuana facilities to assist Qualified Patients with evaluation, counseling and acquisition of medical marijuana, as well as medical marijuana grow operations for the growing, cultivation, planting and manufacturing of medical marijuana. Ferndale Code of Ordinances, §7-411.

1. Medical marijuana facilities and grow operations shall not be allowed within 500 feet of an educational institution, nursery school, child care center, or another facility or grow operation. Ferndale Code of Ordinances, §24-165(a)(2) (**Tab 11**).

2. The facility or grow operation can't provide direct access to another type of business, residence or living quarters. Ferndale Code of Ordinances, §7-415(2).

3. The hours of operation are limited from 8:00 a.m. to 8:00 p.m. Ferndale Code of Ordinances, §7-415(3).

4. A facility can provide drug paraphernalia for use, sale or lease to Primary Caregivers or Qualifying Patients. Ferndale Code of Ordinances, §7-415(5).

IV. Marijuana-Related Businesses - Current Issues for Shopping Center Owners

A. Banking

1. The provisions of the money laundering statutes (18 USC §§ 1956 and 1957), the unlicensed money remitter statute (18 USC § 1960), and the Bank Secrecy Act remain in effect with respect to marijuana-related conduct. See, Deputy Attorney General James Cole Memorandum dated February 14, 2014, at 2 (**Tab 12**).

2. Federal Reserve Banks are refusing to grant master accounts to financial institutions that accept deposits from marijuana related businesses. See, The Fourth Corner Credit Union v Fed Reserve Bank of Kansas City, 2016 US Dist Lexis 517 (D. Colo. 2016). In that case, the US District Judge refused to consider a request by a Colorado state-chartered credit union to force the Federal Reserve Bank to issue a master account (which is vital for a financial institution to engage in the electronic transfer of funds). The Judge noted that "courts cannot use equitable powers to issue an order that would facilitate criminal activity." Id., at *8. Thus, dispensaries are unable to deposit cash in banking institutions.

3. The Financial Crimes Enforcement Network (FinCEN) has issued guidance to financial institutions seeking to provide services to marijuana-related businesses. See, "BSA Expectations Regarding Marijuana-Related Businesses", FIN-2014-G001, issued February 14, 2014 (**Tab 13**). The Guidance, among other things, states that a financial institution should conduct customer due diligence that includes:

(i) verifying with the appropriate state authorities whether the business is duly licensed and registered;

(ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business;

(iii) requesting from state licensing and enforcement authorities available information about the business and related parties;

(iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers);

(v) ongoing monitoring of publicly available sources for adverse information about the business and related parties;

(vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and

(vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. Ibid.

4. If a financial institution elects to transact business with a marijuana-related business, it is obligated to file a Suspicious Activity Report, even if the activity is totally legal under state law. Ibid. There are three types of reports: "Marijuana Limited" Suspicious Activity Reports, where the financial institution reasonably believes that its customer's activities do not implicate one of the Cole Memo priorities or violate state law; "Marijuana Priority" Suspicious Activity Reports, where a Cole Memo priority or violation of state law is implicated; and "Marijuana Termination" Suspicious Activity Reports, where the financial institution deems it necessary to terminate the relationship with the marijuana-related business.

B. Ventilation

1. Cooling and dehumidification are major components of hydroponic facilities.

2. See attached articles on "HVAC's Growing Role in the Marijuana Industry" (Reprinted with permission from The Air Conditioning, Heating & Refrigeration News, Copyright 2016, www.achrnews.com) (**Tab 14**) and "Welcome to the Jungle" (Reprinted with permission from NFPA Journal® (Vol. 110, #5) copyright © 2016, National Fire Protection Association, Quincy, MA. All rights reserved.).

C. Civil forfeitures

1. Under § 856 of the CSA, it is a federal crime to "manage or control any place, ... as an owner, ... and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 21 USC § 856(a)(2).

2. Section 881(a)(7) of the CSA permits forfeiture of "All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment." See also, 18 USC §981(a).

3. 18 USC §983(d) provides an "innocent owner defense" to a civil forfeiture action.

a. If the property was owned at the time of the illegal conduct, an "innocent owner" is an owner who did not know of the conduct giving rise to the forfeiture or, upon learning of the conduct, did all that reasonably could be expected under the circumstances to terminate such use of the property. 18 USC §983(d)(2)(A).

b. If the property was acquired after the illegal conduct, an "innocent owner" is a bona fide purchaser for value and did not know and was reasonably without cause to believe that the property was subject to forfeiture. 18 USC §983(d)(3)(A).

D. Insurance availability

1. There are several insurance companies that offer coverage for marijuana-related businesses.

2. For example, Next Wave Insurance Services in San Diego, California offers general liability, products liability, excess liability, cyber liability, property, crop, equipment breakdown, workers' compensation and directors & officers coverages, as well as product training courses designed exclusively for registered agents catering to recreational and medicinal cannabis businesses.

3. Similarly, EastCann Insurance of Marblehead, Massachusetts offers comprehensive insurance packages at competitive rates to registered marijuana dispensaries, cultivation facilities, infused product manufacturers, landlords, events and retail operations of all sizes in Massachusetts, Maine, New Hampshire, Vermont, Rhode Island, Connecticut, District of Columbia, Michigan, Colorado, Arizona, California and Washington.

E. Security

1. Because marijuana-related businesses are unable to utilize normal banking channels, they must rely heavily on cash transactions, and thus become a natural target for thieves.

2. An August, 2016 news report from Portland, Oregon suggests, however, that dispensaries are not being targeted as was originally feared. Oregon Public Broadcasting, "Police Say Marijuana Dispensaries Aren't Big Targets For Thieves," <http://www.opb.org/news/article/marijuana-dispensaries-oregon-cash-theft-target/>, August 4, 2016 (last accessed January 12, 2017).

3. "Roughly 90% of financial and product loss in the marijuana industry can be chalked up to employee theft, according to security experts who work with cannabis companies. . . . Employee theft is prevalent in most industries but is particularly challenging for cannabis companies, which often deal with large amounts of cash and a product that is easy to pilfer. That increases the temptation among workers to divert some money or cannabis into their own pockets – and makes employee theft much more difficult for businesses to identify and prevent." Marijuana Business Daily, "For Marijuana Companies, Biggest Security Concern Comes From The Inside," <https://mjbizdaily.com/for-marijuana-companies-biggest-security-concern-comes-from-the-inside/>, May 26, 2015 (last accessed January 12, 2017).